

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)
) CA No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY AVERAGE) CA No. 06-11337-PBS
WHOLESALE PRICE LITIGATION) Pages 1 - 57
)

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
January 19, 2010, 2:30 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
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1 A P P E A R A N C E S:

2
3 FOR THE PLAINTIFFS:

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5 Assistant United States Attorneys, Office of the United States
6 Attorney, United States District Court, Suite 9200,
1 Courthouse Way, Boston, Massachusetts, 02210, for the United
States.

7 GARY L. AZORSKY, ESQ., Berger & Montague, PC,
8 1622 Locus Street, Philadelphia, Pennsylvania, 19103, for
Ven-A-Care of the Florida Keys.

9
10 FOR THE DEFENDANTS:

11 SARAH L. REID, ESQ., and MARISA A. LORENZO, ESQ.,
Kelley, Drye & Warren, 101 Park Avenue, New York, New York,
12 10178, appearing for Dey Pharmaceutical

13 MARTIN F. MURPHY, ESQ., Foley Hoag, LLP,
Seaport West, 155 Seaport Boulevard, Boston, Massachusetts,
14 02210-2600, for Dey Corporation.

15 HELEN E. WITT, ESQ. and JOHN W. REALE, ESQ.,
Kirkland & Ellis, LLP, 300 North LaSalle Street, Chicago,
16 Illinois, 60654, for Boehringer Ingelheim.

P R O C E E D I N G S

THE CLERK: In Re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Action 01-12257 and 06-11337, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. HENDERSON: George Henderson, Assistant U.S. Attorney for the United States.

MR. FAUCI: Jeff Fauci, Assistant U.S. Attorney for the United States.

MR. AZORSKY: Gary Azorsky representing Ven-A-Care of the Florida Keys.

MS. REID: Sarah Reid representing the Dey Corporation from Kelley, Drye & Warren.

MS. LORENZO: Marisa Lorenzo from Kelley, Drye & Warren representing Dey.

MR. MURPHY: Martin Murphy, also representing Dey, your Honor.

MS. WITT: Good afternoon, your Honor. Helen Witt on behalf of the Boehringer defendants.

MR. REALE: Good afternoon, your Honor. John Reale on behalf of the Boehringer defendants as well.

THE COURT: Okay. As I understand it, I have cross-motions for summary judgment. Is that correct?

MR. HENDERSON: Well, I think the parties' understanding, your Honor, is that there are two motions before

1 the Court. One is the government's motion to consolidate, and
2 the other is a motion by the Boehringer defendants for summary
3 judgment with respect to the liability of the parent companies,
4 essentially a corporate veil type issue.

5 THE COURT: Did you let me know this is what you were
6 planning on focusing on?

7 MR. HENDERSON: This is what your Honor scheduled.

8 MR. REALE: Yes, your Honor, the parties filed a
9 jointly proposed schedule I think back in the second week of
10 December.

11 THE COURT: I actually prepared on something else, but
12 I will listen. So when are we doing the basic motions for
13 summary judgment?

14 MR. HENDERSON: Well, we had initial arguments back in
15 October.

16 THE COURT: But they were by no means done. We had
17 the witness Duggan on stand.

18 MR. HENDERSON: Correct.

19 THE COURT: When is all that going to be finished?

20 MR. HENDERSON: It hasn't been scheduled, your Honor.
21 Your Honor needs to schedule that. We have Daubert hearings
22 coming up later this week and into the following week, but the
23 remaining arguments -- I think, yes, on the summary judgment --

24 THE COURT: So today is just on the parent issue and
25 on consolidation?

1 MR. HENDERSON: Yes.

2 THE COURT: So I sat and read about all this other
3 stuff for another day. All right. Do I need a whole hearing
4 on parent/sub? Haven't we gone there before?

5 MR. HENDERSON: There was brief, very brief
6 abbreviated argument at the summary judgment arguments.

7 THE COURT: Let's not just do that right now. Let's
8 just start on the motion to consolidate. I think I've ruled on
9 this in other contexts before, haven't I?

10 MS. WITT: No, your Honor. This is a very different
11 situation than any of the ones that have appeared before you in
12 the AWP case. This has two prime elements: One is a
13 traditional kind of piercing-the-corporate-veil theory, and the
14 other is direct liability claims asserted, we think too late,
15 but asserted in the papers against the parent companies and a
16 sibling company, as opposed to the companies whose products are
17 actually at issue. But I would agree that the consolidation
18 motion from the point of view of the parties is the more
19 time-critical because of trial preparation needs than --

20 THE COURT: When is the case scheduled for?

21 MS. WITT: The 26th of April.

22 THE COURT: All right, go ahead.

23 MR. HENDERSON: I'll proceed, your Honor, on the
24 motion to consolidate. If the Court wishes to get to the other
25 motion, Mr. Fauci is prepared to address that.

1 THE COURT: Well, he's here. You're up from
2 Washington?

3 MR. FAUCI: No. I'm in the U.S. Attorney's office.

4 THE COURT: You're here? Okay.

5 MR. HENDERSON: So, your Honor, we've moved to
6 consolidate the Dey and the Roxane cases, and I want to spend a
7 little more time on the Medicare piece of this litigation
8 because I think it very strongly militates towards
9 consolidation, and in addition it represents well over
10 80 percent of the total damages in these two cases, at least
11 under the approach that we are taking.

12 THE COURT: This is bench trial, right?

13 MR. HENDERSON: Jury trial.

14 THE COURT: Jury.

15 MR. HENDERSON: Yes. Now, the Medicare piece of the
16 case, as I said, over 80 percent of the damages are
17 concentrated in one drug, ipratropium bromide. Both Dey and
18 Roxane marketed their individual versions of this. They are
19 identical generic drugs essentially. This ipratropium bromide
20 product was used in connection with durable medical equipment
21 and was covered by Medicare Part B.

22 When Roxane prepared to launch this drug in 1986, it
23 hired a former Dey consultant, who advised them on creating an
24 attractive spread and advised them how to market this product.
25 And in Roxane 's launch plan for the product, Roxane observed,

1 and I quote, "The single most significant factor that will
2 influence the success of this product is Dey Laboratories."
3 And that held to be true, as Dey ultimately, six months later
4 they launched their version of the drug, and the two companies
5 competed against one another. Dey ultimately took over a
6 majority of the market share of this product.

7 In our summary judgment hearing back in October, we
8 argued to the Court about our so-called combined impact theory
9 of liability, joint and several liability for this drug.

10 THE COURT: Right, and so let me just refresh my
11 recollection here. Are you complete on the arguments on that?
12 I hadn't remembered we were done with it.

13 MR. HENDERSON: Let me, because it is important, I
14 think, to our motion to consolidate --

15 THE COURT: It's critical.

16 MR. HENDERSON: I think it's very important.

17 THE COURT: I mean, I can't rule on one without the
18 other, so, in your view, is the oral argument complete on that?

19 MR. HENDERSON: I would like to refresh your Honor's
20 recollection of this issue and why it mandates consolidation.
21 We illustrated to your Honor how Medicare and these carriers
22 pay for this particular drug.

23 THE COURT: Right.

24 MR. HENDERSON: They have these arrays.

25 THE COURT: Right.

1 MR. HENDERSON: And they calculate the median.

2 THE COURT: Right.

3 MR. HENDERSON: And we pointed out that for many of
4 the arrays, up to a critical point in time, about midway
5 through our history, you can lower the Dey AWP's by even a
6 penny, and it changes the median, and it changes how much
7 Medicare paid. And likewise you can look at Roxane
8 individually, and just a couple of pennies lowering their AWP,
9 it changes things. Then there's a critical tipping point, and
10 we illustrated this in the Cigna arrays, where one new
11 manufacturer has a product whose AWP appears in the array, one
12 more product in the array, and from that point forward, you can
13 change any single manufacturer's AWP's down to a few cents. You
14 can drastically lower the Dey AWP's, and it doesn't change the
15 median calculation, and likewise as to Roxane; but if you
16 lowered both of their products, even just by a couple of
17 pennies, it does affect the median.

18 And so our argument is, your Honor, that we show
19 clearly causation from the combined effects of the two
20 companies, and that the mere fact that one new manufacturer's
21 product has entered the market, under defendants' theory, they
22 say the government can recover nothing; even if we'd sued all
23 of the companies in this array and proven liability with
24 respect to each one of them, we could never recover a single
25 penny because you have to look at each one in isolation.

1 THE COURT: Right, and we did talk about this last
2 time.

3 MR. HENDERSON: Yes, so --

4 THE COURT: Regardless of how I ruled, though, do you
5 still want consolidation?

6 MR. HENDERSON: Yes.

7 THE COURT: Because it's still some damages.

8 MR. HENDERSON: Yes. Oh, yes, even under our
9 conservative theory, your Honor, just the Medicare damages,
10 they're about 50 percent of the total. The --

11 THE COURT: So my ruling on that summary judgment
12 point, which for some reason -- it's true it was before
13 Christmas and I was champing at the bit for vacation -- I just
14 had remembered we weren't done with.

15 MR. HENDERSON: Correct.

16 THE COURT: So I don't remember, we still have a lot
17 of Duggan to do, right, and the defense expert on these arrays
18 and how much the damages really are? So I don't need to rule
19 on this issue because whichever way I rule on this issue, you
20 wanted a consolidated trial, right?

21 MR. HENDERSON: That's correct. I think ruling on the
22 issue will help us out certainly at trial, but --

23 THE COURT: For sure, but I'm just saying, you want it
24 no matter how I rule, so I don't have to rule on summary
25 judgment first, right?

1 MR. HENDERSON: That's correct.

2 THE COURT: And how many drugs are at issue between
3 the two companies?

4 MR. HENDERSON: Drugs or NDCs?

5 THE COURT: Drugs.

6 MR. HENDERSON: For Dey, there are three categories of
7 drugs: albuterol, and there are maybe three different versions
8 of albuterol, ipratropium bromide, and cromolyn sodium.

9 THE COURT: Right.

10 MR. HENDERSON: For Roxane, I think there are nine
11 different drugs? Yes.

12 THE COURT: So that would -- and I understand there
13 are multiple more NDCs. Typically, though, you can understand
14 it by drug.

15 Let me ask you this: That's the issue, which is would
16 a jury be able to keep all nine -- actually twelve or nine
17 drugs straight?

18 MR. HENDERSON: Yes. Now, we have suggested in our
19 reply in support of the motion to consolidate, your Honor, that
20 the Court phase the trials into two parts: Start with the
21 Medicare piece because it is much simpler, and it commands, in
22 our view, over 80 percent of the damages, and then move on to
23 the Medicaid piece. And our thinking is --

24 THE COURT: Separate juries?

25 MR. HENDERSON: The same jury.

1 THE COURT: Yes, but the juries get furious, furious.
2 I mean, you know, I'm not going to --

3 MR. HENDERSON: A reason we did that, your Honor, is
4 that if we tried the Medicare piece, which would be a lot
5 simpler and a lot shorter, because it commands so much of the
6 damages, I think the Medicaid piece would get resolved --

7 THE COURT: Yes, but how long would the Medicare piece
8 take for two drug companies and all the drugs?

9 MR. HENDERSON: I would say, in terms of the total
10 trial time, maybe half, a little bit more than half of the
11 total trial time.

12 THE COURT: No, but tell me. A month, two months, two
13 weeks? What is it?

14 MR. HENDERSON: I haven't thought about it in terms of
15 the Medicare. I would say a month.

16 THE COURT: For the government's case?

17 MR. HENDERSON: No.

18 THE COURT: For the whole thing?

19 MR. HENDERSON: The whole thing.

20 THE COURT: So one month if we just did what,
21 Medicare?

22 MR. HENDERSON: If we just did Medicare.

23 THE COURT: And what would it be -- and I understand
24 it's ball-parking -- what would it be if you added Medicaid?

25 MR. HENDERSON: Another three to four weeks, and a lot

1 of that is my guessing of what the defense would do.

2 THE COURT: So that's the problem. You never find a
3 jury for two months, never. I just did a three-week antitrust
4 trial, and it was hard enough.

5 MR. HENDERSON: Well, if we tried them all together, I
6 think it would take up that full amount.

7 THE COURT: Yes, it would. If I bifurcate, it doesn't
8 help me. Are there Beacon Theatres issues if I just did one
9 trial and then a second trial?

10 MR. HENDERSON: I think we'd do the first trial, get a
11 judgment, and if the rest of the Medicaid piece didn't
12 immediately resolve --

13 THE COURT: If you lose, does that mean you lose on
14 Medicaid?

15 MR. HENDERSON: No, but it would sure push us toward a
16 quick settlement, your Honor.

17 THE COURT: If you win, does that create collateral
18 estoppel on any issues?

19 MR. HENDERSON: On some issues, yes, but not on all.

20 THE COURT: I mean, I imagine we could knock out a
21 whole drug, for example, but if you just won on a sub-issue, I
22 don't know because there are different methodologies for
23 payment. So I'm worrying, so I'm just wondering why I wouldn't
24 just have two completely separate trials rather than one --
25 you're nodding. I'm not talking about between Dey and -- I

1 think it makes a lot of sense to have Dey and Roxane tried
2 together, but what I have a problem with is having nine drugs,
3 two defendants, two months. Why wouldn't I have two
4 defendants, ipratropium bromide, Medicare? Wouldn't that
5 settle it and be more concise?

6 MR. HENDERSON: Yes.

7 THE COURT: Just one drug, one statutory scheme, two
8 defendants, what would that be?

9 MR. HENDERSON: That would be a much shorter and more
10 manageable trial. Under our Medicare case, your Honor, we've
11 only alleged two drugs. One is a small drug moneywise. It's
12 albuterol.

13 THE COURT: Do both sell it?

14 MR. HENDERSON: No, only Dey, but it's just one drug,
15 and the evidence is relevant to ipratropium bromide because
16 it's 404 -- even if it was only ipratropium bromide, we'd use
17 the same evidence because it's part of the pattern and
18 practice.

19 THE COURT: Yes, but against one defendant, so then I
20 have problems with whether it's overly prejudicial to the
21 other. I don't know, I'd have to think about that. I don't
22 know enough about the case yet.

23 All right, so that's April 28? Is that when the day
24 of the thing is?

25 MR. HENDERSON: April 26.

1 THE COURT: April 26. And you think it's one month?

2 MR. HENDERSON: Yes.

3 THE COURT: Okay, if I knocked it down to one drug,
4 two defendants, Medicare, it's a two- or three-week trial,
5 right?

6 MR. HENDERSON: I think the government's case would
7 take about two weeks.

8 THE COURT: All right, so maybe, say, two weeks for
9 each, one week per defendant or something.

10 Anyway, let me hear from you all.

11 MS. REID: Your Honor, Sarah Reid on behalf of Dey.
12 Let me start from the beginning. Mr. Henderson has suggested
13 that by trying Medicare, you will somehow resolve or the
14 parties would be able to resolve Medicaid, and in the case of
15 Dey, that is simply not so.

16 THE COURT: Assume it's not true. Suppose I just need
17 a manageable trial and I don't want to try ipratropium bromide
18 twice. Why don't I just do two defendants, one drug, Medicare?

19 MS. REID: Because, your Honor, if I may respectfully
20 suggest, a manageable trial would be to try Dey. There are
21 only three drugs at issue. They are all inhalation drugs.
22 They're albuterol --

23 THE COURT: So how long would just Dey be?

24 MR. MURPHY: Just Dey? I would say --

25 THE COURT: You say Medicare and Medicaid?

1 MS. REID: Medicare and Medicaid, I think you're
2 looking at, realistically, four to six weeks. And this is why,
3 your Honor --

4 THE COURT: I'm going to do that twice?

5 MS. REID: No. No, because it's a very different
6 pattern of drugs. Dey is a niche manufacturer. It's
7 inhalation drugs, only inhalation drugs. The time frame that
8 you're really focused on is the mid-1990s. And then the
9 information, the knowledge that you're going to be hearing from
10 is identical on CMS, OIG reports. All of that is common to
11 Medicaid and Medicare, as are the Dey witnesses.

12 THE COURT: No, but I don't buy that for a second
13 because I've seen all this briefing about different levels of
14 knowledge for each Medicaid official.

15 MS. REID: But the way, your Honor, I think
16 practically that's going to come in is through videotape clips
17 from the various depositions that have been taken.

18 THE COURT: Sure, and that takes forever. I just had
19 a three-week antitrust trial. It takes forever, and it's
20 deadly dull, okay; you know, like, I had snoozing jurors. So
21 I'm not disagreeing. Just why should I do that twice? I'm
22 going to listen to the same thing from both defendants, the
23 exact same --

24 MS. REID: Well, and I'm not -- I don't want to make
25 Roxane --

1 THE COURT: Why not just have Medicare where I'm only
2 dealing with the CMS officials?

3 MS. REID: Because Medicaid you're dealing with the
4 CMS officials too. CMS has a Medicaid division. CMS approves
5 every one of the state plan amendments. The administrators
6 from CMS --

7 THE COURT: But Medicare, all I have is the CMS,
8 that's all. So I must have like what, three officials or
9 something?

10 MS. REID: You're also going to have the administrators,
11 the various OIG reports which we'll have to go through twice
12 because that's going to be relevant to Medicaid and to
13 Medicare. And the fact of the matter is that Roxane is a very
14 different company, and there are very different issues, and
15 they're very different drugs.

16 THE COURT: Well, what if I just had ipratropium
17 bromide?

18 MS. REID: Well, then you're in the situation --

19 THE COURT: You don't want it because it would make it
20 sound like a conspiracy basically, right? I mean, you don't
21 want it because the jury is going to say a pox on both your
22 houses.

23 MS. REID: Your Honor, and there's also huge conflicts
24 between the companies. They are direct competitors. Nowhere
25 in the complaints -- and I don't think the government

1 disagrees -- is there any allegation of collusion, of any kind
2 of conspiracy. There's no claim of conspiracy.

3 THE COURT: Well, as I understand it, you're competing
4 with each other for the bigger spread.

5 MS. REID: We're competing with each other --

6 THE COURT: That's always been the motive as to why
7 the government's always claimed, so the issue is really not so
8 much -- that's why I'm agreeing with -- I don't think there's
9 prejudicial spillover, so why wouldn't I do it at the same
10 time?

11 MS. REID: Because the problem in part is exactly
12 illustrated by what your Honor asked Mr. Henderson about
13 albuterol. The documents from Dey on albuterol and cromolyn
14 are less helpful. There are not those kinds of documents for
15 Dey on ipratropium. The Roxane documents on ipratropium are,
16 from Dey's point of view, not helpful. So combining this all
17 together with the inhalation drugs, you have Dey potentially,
18 you know, being prejudiced by the Roxane documents, and
19 Roxane --

20 THE COURT: I see, so that's the gist of it.

21 MS. REID: And then the other issue is these joint
22 scenarios where there is a direct conflict between two
23 different scenarios that the government is proposing, which
24 will put Dey --

25 THE COURT: Why, why?

1 MS. REID: Because under one scenario of their
2 \$1.1 billion scenario for ipratropium, Dey is responsible,
3 according to them, for three-quarters of a billion dollars.
4 The other scenario, which is the \$1.4 billion scenario, Roxane
5 is responsible for three-quarters of a billion, and Dey is
6 responsible for \$340 million. And that's a huge problem, your
7 Honor. The expert -- I mean, the jury is going to be asked to
8 look at --

9 THE COURT: Well, I would have to make a legal ruling,
10 so that issue will go away, right?

11 MS. REID: And maybe -- but, your Honor, I mean, what
12 you're asking and what I guess I'm saying is it's not --

13 THE COURT: The legal issue is extremely difficult,
14 but it would be a legal question, not a factual issue. The
15 harder one you're asking me to think about is that you each may
16 have documents about you that would have prejudicial spillover
17 for the other. That's really the legal question as to whether
18 or not that precludes trying the two of you together. What
19 you're saying is, you have some lousy documents in your file,
20 she's got some lousy documents in her file, and neither of you
21 want to be tainted by the other one's lousy documents.

22 MS. REID: There is also another issue --

23 THE COURT: Do I have that --

24 MS. REID: Yes, That you have exactly right, your
25 Honor. The other point I would point out is that Dey and

1 Roxane have very different pricing practices. Dey reported a
2 declining WAC, which is its actual wholesale price, not fully
3 discounted, but it was declining, it goes down over time, and
4 it was published. Roxane had a different policy. They did not
5 publish their WAC. Each company had its own reasons for doing
6 it, but the jury is going to be asked to hear from each company
7 why they did particular pricing, why they published certain
8 pricing. That is an issue which is a real issue of possible
9 confusion to the jury.

10 THE COURT: So the two issues would be, one, possible
11 confusion between pricing practices. With two I'm not as
12 worried about that, but the prejudicial spillover, let me ask
13 you about the prejudicial spillover.

14 MS. REID: And I did have one more.

15 THE COURT: Oh, I'm sorry, you had a third point?

16 MS. REID: The third is the experts. The experts are
17 different. Neither Roxane or Dey attended each other's
18 depositions or their expert depositions because at that point
19 in time in fact discovery, there was no hint of moving to
20 consolidate at that point. There's nothing in the complaints --

21 THE COURT: Was there anything that you can point to
22 that's a problem?

23 MS. REID: Yes. The Dey expert has analyzed and done
24 certain kinds of analysis, particularly on the state claims
25 data, which the Roxane expert has not.

1 THE COURT: But if I stick to Medicare, that's not a
2 problem.

3 MS. REID: That will not be a problem in terms of
4 states claims data, that is true. On the other hand, I think
5 the experts' positions are different, even on Medicare. And
6 that there is an issue of having two different experts for
7 essentially the same class of drugs testifying, and the jury
8 basically thinking "Help," you know, whatever. I mean, your
9 Honor, at the end of the day, from Dey's point of view, the
10 biggest prejudice that I worry about is that --

11 THE COURT: What are the two of you saying that are
12 different between Dey and Roxane about the experts?

13 MS. REID: We have --

14 THE COURT: Skip the state. I'm talking about only
15 Medicare.

16 MS. REID: On Medicare, our expert is going to be
17 discussing issues on the arrays, and there are potentially --

18 THE COURT: Isn't their expert going to say the same
19 thing?

20 MS. REID: I don't, your Honor, actually know for sure
21 what Roxane's position will be --

22 THE COURT: I'll get to Roxane.

23 MS. REID: -- but I think that there is a very good
24 likelihood that the two companies will be in distinct
25 opposition as to whether or not the arrays are correctly

1 constructed, and the experts are going to be testifying as to
2 that.

3 THE COURT: Well, have you actually looked at --

4 MS. WITT: Your Honor, I can give you a few specific
5 examples, and I don't want to -- I don't think it's fair for
6 either of us to have to give too many examples --

7 THE COURT: All right, if you don't want to be
8 consolidated, I'd give a few.

9 MS. WITT: Well, I'll give you a couple that are very
10 important to us, and one has to do with this billion-dollar
11 issue of NovaPlus, and that is the question of causation on the
12 arrays.

13 THE COURT: But that was argued, and that is something
14 I need to rule on.

15 MS. WITT: Whether NovaPlus remains in the case,
16 clearly.

17 THE COURT: Right.

18 MS. WITT: But assuming that NovaPlus does remain in
19 the case, our causation argument is very clear that NovaPlus
20 should have been treated in the arrays as if it were a generic
21 product because in fact it was a generic product, and all
22 indicia were that it was a generic product, and that there was
23 no reason why some of the DMERCs but not all in some periods
24 but not others called it a brand name product, and they have
25 many hundreds of millions of dollars resulting from that. Dey

1 has every incentive in the world to align with the government
2 on that point because they're not liable for the NovaPlus.

3 THE COURT: You know, I frequently have situations in
4 the civil context where the parties point fingers at each
5 other.

6 MS. WITT: Well, but those contexts, with all due
7 respect, your Honor, are not where there are treble damages at
8 issue or not where there are civil penalties at issue.

9 THE COURT: Aren't I the -- who decides if they're
10 treble? Me, right?

11 MS. WITT: No.

12 THE COURT: The jury decides if it's treble?

13 MS. WITT: It's automatic in the statute under the
14 False Claims Act.

15 THE COURT: It's an automatic trebling in the False
16 Claims?

17 MR. HENDERSON: Yes, your Honor.

18 MS. WITT: So there are issues here that relate to the
19 nature of the False Claims Act being a very different statute
20 than a negligence --

21 THE COURT: I'm not so persuaded about the pointing
22 fingers at each other. In the criminal context, it can be
23 determinative, but in the civil, it happens every day of the
24 week, cross-claims: "It was his fault. No, it was his fault."
25 That happens all the time. If anything, it's -- you know,

1 remember that "LA Law" incident where both sides pointed at
2 each other, and the jury threw up its hands and simply
3 didn't --

4 MS. WITT: Oh, we are both dating ourselves, but I do.

5 THE COURT: Do you know what I'm talking about? And
6 the jury came back no liability for both because the prosecutor
7 hadn't proved the case, who killed the baby. So, I don't know,
8 it helps both ways.

9 MS. WITT: Well, and let me just point out one other
10 thing, your Honor, and at the risk of -- we were going to put
11 this on the Elmo, but it doesn't show up very well, and I'm not
12 going to use all the slides that are here.

13 THE COURT: Excuse me. Is "LA Law" no longer on the
14 air?

15 MS. WITT: Oh, it's been off for about fifteen years,
16 I think. May I pass this up, your Honor?

17 THE COURT: That's really sad. All right.

18 MS. WITT: I simply want to refer to some of the
19 allegations in the complaint because part of the reason that
20 this is a very different situation --

21 THE COURT: I'll try and come up with a CSI reference
22 next time.

23 MS. WITT: Part of the reason that this is a very
24 different situation now and that it's very prejudicial --
25 that's really what we're looking at, and the case law that's

1 cited in the briefs makes clear that the ultimate test has to
2 be the prejudice, that regardless of how efficient it might be
3 to do it otherwise, if there's prejudice to the defendants by
4 combining them, they shouldn't be combined. And the reason
5 is --

6 THE COURT: There's also -- there's got to be an issue
7 of judicial economy. Now, it may be that it's just ultimately
8 more efficient just to try each person separately, and I'm
9 going to have to make that decision, which I will not do
10 rapidly because I'm going to finish up the summary judgment
11 first and then get to the issue of consolidation because until
12 I know how I'm coming out on the legal issues, I won't be able
13 to actually resolve the prejudice points.

14 MS. WITT: Certainly there's the judicial efficiency
15 that has to be considered and witness efficiency and lawyer
16 efficiency as well.

17 THE COURT: But what's horrifying to me, let me just
18 say this, horrifying, is how long would your case take if I
19 tried you from A through Z, Medicaid, Medicare, everything?

20 MS. WITT: Well, with nine drugs --

21 THE COURT: How long?

22 MS. WITT: -- I think it has to be six weeks. But the
23 Medicaid case will be five weeks if it's tried alone, so that
24 you'll then have a five-week trial and a six-week trial if
25 Medicare is done separately, which seems from our point of view

1 is not good.

2 THE COURT: What's bad news for me is to sit and do
3 two six-week trials with ninety percent overlapping evidence.
4 That would be a problem for me. So I'm trying to think, is
5 there a way --

6 MS. WITT: And that would be the result if there was a
7 Medicare trial and two Medicaid trials because Ms. Reid is
8 absolutely right --

9 THE COURT: That may be, that may be right. I don't
10 see how I do Medicare, Medicaid, both defendants, all drugs.
11 That's just not going to happen, so I need to sit and parse
12 through what I could do.

13 MS. WITT: But what is very different about this case
14 in terms of the prejudice, where we are from the civil cases
15 that your Honor was referencing right now is that all of this
16 comes up for the first time in the summary judgment briefing.
17 It is not anything that the parties were ever put on notice of
18 in the complaint.

19 THE COURT: All what? All what?

20 MS. WITT: That there was going to be a claim that
21 would be a joint and several liability claim against each
22 defendant for not just their own market share but for the
23 entirety of the ipratropium market. And the summary --

24 THE COURT: I understand. That's a fair legal point
25 I'm going to have to address. I'm not even close. It hasn't

1 even reached the top of the pile yet. I'm still working on
2 FULs. So that's next on our pile, and I just haven't started
3 ruling on it. I actually thought, and I may be remembering
4 this incorrectly, that we weren't done with it, so I'm going to
5 have to get back to you all.

6 MS. WITT: Well, the joint and several liability point
7 has not been briefed. There is nothing -- it was briefed in
8 the summary judgment context as a damage theory but not as a
9 joint and several liability theory separate and apart from
10 theories that are pled in the complaint, which are only limited
11 to the marketing.

12 THE COURT: I don't know, I'm not starting a whole new
13 round of briefing. I've got piles in my room. You've done
14 what you're going to do on the summary judgment. We're not
15 doing another one.

16 MS. WITT: Well, that's precisely our point, your
17 Honor. We were not ever given an opportunity --

18 THE COURT: Come on, we knew about -- no, no, no, no,
19 no, we knew about -- this has been briefed all fall, so that's
20 not a surprise issue, so I don't buy that. But it is an
21 issue -- let me go back to you for a minute. I'm struggling --
22 and I will not decide till I decide the motion for summary
23 judgment -- with what to do here because I am not -- it was
24 very difficult to impanel a three-week jury trial in an
25 antitrust matter. To get a jury for two months is a killer,

1 just a killer, and I won't do that. I'm going to take some
2 small subpart and try it. Maybe it's just Dey/Medicare. Maybe
3 it's just Roxane/Medicare. Maybe it's both of them Medicare.
4 But for me to try all drugs, Medicare and Medicaid, it's too
5 hard.

6 MR. HENDERSON: I agree. I'd like to make two points,
7 your Honor. One, the government notified both defendants
8 before we submitted our initial expert reports that we were
9 going to move to consolidate these cases.

10 THE COURT: I'm not going to preclude you from moving
11 to consolidate.

12 MR. HENDERSON: The other point I want to make, your
13 Honor, is that in the Medicare case, if our theory of combined
14 impact is going to go to the jury, I think we must -- we
15 will present evidence, even if we have separate trials, if we
16 go to trial only against Dey, we're going to present evidence
17 of Roxane's liability because, as I read your earlier ruling in
18 the Warrick case, it's not just the fact that their products
19 are in the arrays. I think we have to prove the liability of
20 both defendants in order for that joint impact theory to
21 survive because if we don't, we're not going to be substituting
22 lower AWP's for the empty chair.

23 THE COURT: So you're saying it's necessary to get
24 liability --

25 MR. HENDERSON: Absolutely.

1 THE COURT: -- but it's only if I rule your way on the
2 legal question.

3 MR. HENDERSON: That's correct.

4 THE COURT: So it's consistent, I need to rule on that
5 first --

6 MR. HENDERSON: Yes, I think so.

7 THE COURT: -- before I decide whether it needs to be
8 consolidated or not.

9 MR. HENDERSON: And because it's necessary, there will
10 also be great potential for inconsistent verdicts if they're
11 separate trials.

12 THE COURT: Tough luck for them, I mean, really, if --

13 MR. HENDERSON: Well, it's to the prejudice of the
14 government.

15 THE COURT: No. No, no, no, no, because that happens
16 every day of the week: You have codefendants in a criminal
17 case, somebody's acquitted, and someone's not. That's not
18 inconsistent. They're different juries, different issues. The
19 legal question has got to be consistent across both, but that's
20 my decision, not a jury's decision.

21 MR. HENDERSON: Can I elaborate?

22 THE COURT: Well, why?

23 MR. HENDERSON: Well, suppose we go to trial against
24 Dey, and we attempt to prove our combined impact theory, and
25 the jury finds that Roxane was not liable, and therefore we

1 can't use this combined impact theory. So our damages are
2 going to be about \$300 million lower, \$400 million lower if
3 singles. Then we go to trial against Roxane, and the jury
4 finds that Roxane is liable, which is inconsistent, but also
5 they find that Dey is liable as well, and therefore we have a
6 combined impact damages calculation --

7 THE COURT: Right, but that's only if I rule that
8 there's joint and several.

9 MR. HENDERSON: That's right, yes. If your Honor
10 rejects our combined theory, then --

11 THE COURT: Then you can do separate trials, right?

12 MR. HENDERSON: Well, if your Honor rejects our
13 combined impact theory, you don't have to do separate trials.
14 I'm just saying --

15 THE COURT: Well, no, I don't have to, but I'm just
16 saying, if I did separate trials, there would be no problem of
17 an inconsistent verdict.

18 MR. HENDERSON: That's correct, that's correct.

19 THE COURT: So that legal ruling is absolutely
20 essential.

21 MR. HENDERSON: Yes, yes.

22 THE COURT: So the two legal rulings I have to rule on
23 are that causation issue and NovaPlus.

24 MR. HENDERSON: Well, I think -- I don't think your
25 Honor has to rule on NovaPlus because the result in terms of

1 consolidation is the same; i.e., if your Honor rejects our
2 combined impact theory -- no, I take that back. Your Honor
3 does need to rule on the NovaPlus issue.

4 THE COURT: You know, the last antitrust trial I just
5 had involved Novation, where they did call other things
6 NovaPlus.

7 MR. HENDERSON: Yes.

8 THE COURT: That's what they do, it just so happens.

9 MR. HENDERSON: Yes, there are other NovaPlus drugs
10 out there, so --

11 THE COURT: I mean, that's essentially Novation's
12 brand and not the drug company's brand. Is that --

13 MR. HENDERSON: Well, it's licensed to manufacturers.

14 THE COURT: I don't know whether that counts one way
15 or another when you think about it. It is a brand; it's just
16 the GPO's brand.

17 MR. HENDERSON: Yes, it's a registered trademark.

18 THE COURT: For Novation.

19 MR. HENDERSON: Mr. Fauci is an expert on this
20 particular piece. Would you like to hear argument on why
21 NovaPlus is properly considered a brand?

22 THE COURT: No, but I'm just saying, it is a brand.

23 MR. HENDERSON: Yes.

24 THE COURT: It's just the GPOs's brand.

25 MR. HENDERSON: Well, it's a registered trademark that

1 both Roxane and Novation agree to. There's a formal agreement,
2 and they --

3 THE COURT: Novation sells its products. They
4 re-brand it.

5 MR. HENDERSON: Yes.

6 THE COURT: So I don't know whether that qualifies
7 under the regulation or not. I'm just simply saying, I now
8 understand what NovaPlus is. It's not Roxane's brand name;
9 it's Novation's brand name. Now, maybe that still qualifies
10 under the regulation or not, but unless there's evidence that
11 Roxane also uses the brand name itself, it turns out that
12 it's -- I had sharps containers -- I mean, it turns out that
13 Novation is the largest GPO, right?

14 MR. FAUCI: Yes, that's right, your Honor.

15 THE COURT: And they re-brand their stuff, whether
16 it's medical devices or drugs --

17 MR. FAUCI: The brand is owned by Novation, there's no
18 dispute in that. We submit that under the regulation, that
19 plainly still qualifies as a brand.

20 THE COURT: Right, that's a legal argument, just it's
21 not their brand, it's Novation's brand.

22 MR. FAUCI: Novation owns the trademark to the brand,
23 yes.

24 THE COURT: It's Novation's brand.

25 MR. FAUCI: Well, it's Novation's brand, but Roxane

1 sent the products out under the NovaPlus label, understood.

2 THE COURT: I don't know who did the actual labeling
3 for the packaging, but I'm saying it's not -- Roxane doesn't go
4 into the marketplace as NovaPlus, right?

5 MR. FAUCI: No.

6 THE COURT: Right, okay. So it's a legal question as
7 to whether or not that's enough to be branded under the
8 regulation. It's a pretty straightforward legal question, but
9 the answer is "I don't know" because it's not reached the top
10 of my pile yet. Okay.

11 MS. WITT: And, in any case, it's not the brand name
12 for ipratropium bromide. It's like CVS acetaminophen; it's not
13 a brand name for that particular drug. As you point out, it
14 relates to Novation's, not to the drug.

15 THE COURT: Just your luck, it helps you and hurts you
16 that I just had this antitrust trial. It hurts you in the
17 sense, I need a discrete issue that a jury can try in a
18 discrete period of time; and six weeks, eight weeks is a long
19 time to use up my resources in sitting for two trials that are
20 substantially the same. And it's also an issue of, what can
21 the jury understand? And the second thing is, I happened to
22 learn about Novation at great length, so --

23 MS. WITT: I just wanted to follow up on two very
24 brief things that Mr. Henderson said.

25 THE COURT: Yes, go ahead.

1 MS. WITT: And one at the risk of pointing out
2 something else that there actually has not been briefing on.
3 The briefing was on the causation issue relating to the joint
4 impact theory, but there has not been any briefing on joint and
5 several liability.

6 THE COURT: And there won't be. I'm done with the
7 briefing. I have rooms filled with briefing. We are now going
8 through -- I feel like Rumpelstiltskin going through the piles
9 of gold. I mean, I am just now getting through FUL piles of
10 briefing. I will soon have the Mylan piles of briefing. I
11 have the Neurontin piles of briefing. If you haven't briefed
12 it, it's too late. I'm not saying there may not be time for a
13 motion in limine later on, but for summary judgment, it's done,
14 and I will reject any pleadings. We're done. So --

15 MS. WITT: And the last thing I would just point out,
16 and it's in the briefs, is that with respect to a combined
17 trial, for all the reasons that Ms. Reid talked about with
18 respect to prejudice, the criminal issues that you talked
19 about, this comes from the criminal case; but we have proposed
20 that if you were to do a combined trial of the two defendants,
21 because of the differences that they have in the way they do
22 business, we'd propose two separate juries. The two juries
23 would all hear the common information, but the Roxane jury
24 would not hear all the evidence of the bad documents related to
25 Dey. They would not hear all the evidence of what Mark Pope

1 did when he was a Dey employee, which Mr. Henderson made front
2 and center of his argument this morning simply because --

3 THE COURT: That's actually an interesting -- you
4 know, you'd get -- what do we have, fourteen seats up there or
5 sixteen seats? We can have eight jurors for each and have them
6 sit there and hear different evidence. I did that once in
7 superior court. It was sort of complicated, but it's doable.

8 MS. WITT: But I want to make clear, our preference is
9 still separate trials, but we believe that there is no way
10 without severe prejudice to have one jury decide these issues,
11 given the differences that there are between these companies
12 and the prejudice, the spillover effect that there's no
13 practical way to solve in a combined trial.

14 THE COURT: That's an interesting concept. Thank you.

15 MS. REID: Your Honor, if I may just briefly, I mean,
16 I just want to reiterate. I understand the need for
17 manageability, but I think that the easiest and the most direct
18 is to take it company by company and have a jury -- you know,
19 you'll never hear from Dey again if it's Dey. It will be over,
20 it will be done with.

21 THE COURT: What do you say to his -- if I rule his
22 way on the joint and several, or whatever you want to call the
23 theory, are you willing to waive any arguments about
24 inconsistent verdicts?

25 MS. REID: Your Honor, that's a very interesting

1 question because not only is he going to have to prove, I
2 think -- if that's really what his position is, then he'd
3 better do it for the whole array because --

4 THE COURT: No, no, hear my question. No, you do not
5 have to sue every single tort-feasor. You can pick your
6 tort-feasors. But his most compelling point is, if I rule his
7 way on the legal question, there is a grave risk of inconsistent
8 verdicts or collateral estoppel effects against the plaintiffs.
9 And I haven't thought it all through -- he clearly has -- but
10 unless you're willing to waive it, if I rule his way, it almost
11 necessitates a joint trial.

12 MS. REID: If I could step back --

13 THE COURT: Maybe you haven't thought it all through
14 that way.

15 MS. REID: As a lawyer, when one hears the word
16 "waiver" and you haven't thought about it all the way through,
17 I'm not in a position at this point to tell your Honor.

18 THE COURT: Sure.

19 MS. REID: But I will say this: Interestingly, Dey is
20 being sued for albuterol. You had, as your Honor knows,
21 Warrick and the Warrick damages, the damage model that your
22 Honor came up with on moving the median. There is no claim in
23 this case that Warrick has anything to do with Dey. There is
24 not going to be any proof about albuterol --

25 THE COURT: Excuse me. That was a different lawyer.

1 It was the class case. It was the tail at the end, and,
2 frankly, I don't think the lawyers gave it enough thought. So
3 I can't estop the government from making the argument.

4 MS. REID: What I'm saying is that in this case, your
5 Honor, their damage claims against Dey for albuterol are based
6 on Dey alone moving the median, which leads to a relatively
7 very modest amount of damages. They have no --

8 THE COURT: \$300 million.

9 MS. REID: \$300,000.

10 THE COURT: What?

11 MS. REID: \$300,000 on albuterol.

12 THE COURT: \$300,000? I thought it was \$300 million.

13 MS. REID: That's ipratropium. Cromolyn they have no
14 damages because Dey can never move the median, and it's only on
15 ipratropium of the three that we have the joint impact theory.

16 THE COURT: Sure.

17 MS. REID: And --

18 THE COURT: Well, that's why I was proposing that sub-
19 category, the two of you, ipratropium, and Medicare.

20 MS. REID: Again, with all due respect, I think it is
21 a simpler thing for a jury to hear Dey and Dey's inhalation
22 drugs as opposed to Roxane --

23 THE COURT: Let me put it this way: I am not going to
24 rule on this until I rule on the legal theory, but if I let
25 them win, unless there's a waiver, there is a serious issue --

1 you need to think it through too, but of, you know, who wants
2 to waive? As you say, every lawyer in the room's hair goes up:
3 "Why should I waive anything?" I mean, your whole instinct is
4 against waiving anything when this much money is involved, but
5 why isn't his argument correct?

6 MS. REID: Well, your Honor, I mean, respectfully, I
7 think you need to let me think about it --

8 THE COURT: Sure.

9 MS. REID: -- and you think about it further and look
10 at the briefing. On the summary judgment, your Honor, where we
11 left it in October was --

12 THE COURT: Yes, I would be -- thank you.

13 MS. REID: -- the plaintiffs had concluded, the
14 government's motions for summary judgment had been argued.

15 THE COURT: Right.

16 MS. REID: And the defendants' argument limited
17 cross- -- well, actually our motions for partial summary
18 judgment had not been argued.

19 THE COURT: And I actually thought that was what we
20 were hearing today, so my fault. How long ago was this agenda
21 set? You said in early December?

22 MS. REID: December.

23 THE COURT: I think what really this highlights is
24 probably we should all have a conference call with Mr. Alba
25 prior to entering in this because that's actually what I

1 thought was being argued today were the cross-motions. So no
2 one's fault, probably mine, but you've got to understand
3 with -- how many docket entries are we up to?

4 MS. REID: A gazillion.

5 MR. HENDERSON: Close to 7,000.

6 THE COURT: Close to 7,000. Short of us scrubbing
7 them, I won't remember. I have, as you know, at least seven or
8 eight of these, not to mention related cases like Mylan or
9 McKesson, not to mention the Neurontin. I won't remember, so
10 this is a reminder to me to make sure Mr. Alba talks to you, a
11 reminder to you to make a call as to what's on the agenda at
12 any given point. But, anyway, I didn't prepare. I knew motion
13 to consolidate might be on there, so I'm not as surprised
14 there. I totally forgot about the Roxane parent thing.

15 MS. REID: Your Honor, I would just add, although as
16 you have probably observed, my strong preference is not to go
17 this route, but to the extent there is some form of
18 consolidation, I would definitely join with Ms. Witt's request
19 for two juries because I think without that, the prejudice
20 issue is --

21 THE COURT: I do have to think about that. What do
22 you think on the prejudicial spillover? That's the one thing
23 that's sort of holding me back, which is, you know, if you have
24 really lousy documents on albuterol, let's say, and you say
25 it's a 404(b) -- I do that routinely in a criminal case. I

1 say, well, only consider that against one defendant and not the
2 other. But if there are too many, is there prejudicial spill-
3 over? I mean, do you have a lot of them?

4 MR. HENDERSON: On only ipratropium bromide? Yes,
5 there's a fair amount of that coming from the albuterol piece.
6 And if we do Medicare only, we do want to, although the damages
7 for albuterol are small, we do want to try that together.

8 THE COURT: Right, I'm just saying, why wouldn't there
9 be some prejudicial spillover on Roxane?

10 MR. HENDERSON: I'm sure the Court could issue
11 instructions that would prevent that.

12 THE COURT: If we were talking about one document, you
13 know -- what do you have for Roxane that would hurt Dey? Isn't
14 there that document if Dey gets into --

15 MR. HENDERSON: On both sides, your Honor, the
16 evidence of intent, a large piece of it, a fair amount of it
17 comes from other drugs because they were marketing and
18 developing their basic marketing strategy in the earlier times
19 and on other drugs. So our best evidence, for example, in
20 Roxane, some of our best evidence relates to Asathioprine and
21 Furosamide; and likewise for Dey, some of our best evidence is
22 albuterol. And we think that's relevant to showing intent
23 because --

24 THE COURT: Sure, it's definitely relevant. I mean,
25 you know, I always have to weigh it under 403. It's relevant,

1 does the prejudice outweigh the -- I mean, my guess is some of
2 it would come in, but I haven't really thought about it. The
3 issue is whether or not if you have 50 documents on albuterol,
4 and also with theirs, whether or not I can cure it by saying,
5 "Only consider this against one and not the other." But I
6 think the suggestion for separate juries might work some of it.

7 MR. HENDERSON: It would not work if our combined
8 theory is to be allowed to go to a jury --

9 THE COURT: Fair enough.

10 MR. HENDERSON: -- because there's just no way the
11 juries could avoid that inconsistency.

12 THE COURT: Fair, fair, fair, fair. I have to think
13 about it. It's a very good argument and a good issue. But can
14 we go on to the parent/sub thing?

15 MS. WITT: I'd just like to address one thing related
16 to the joint impact theory and the risk of inconsistent
17 verdicts, your Honor, because I do believe that there is not
18 such a huge risk related to there. There are risks, if there
19 were two separate trials, of collateral estoppel issues, but
20 they would relate to different kinds of issues. There could
21 certainly be collateral estoppel effects with respect to the
22 government's information and policy-making decisions relating
23 to ipratropium, for instance, but that kind of collateral
24 estoppel is not something you should --

25 THE COURT: You mean the government knowledge defense?

1 MS. WITT: Something along those lines, correct.

2 THE COURT: But suppose on the core liability issues
3 they find that Dey was guilty and Roxane wasn't, and I ruled
4 their way on the legal issue, but they actually don't award
5 damages on that because they find you weren't liable, wouldn't
6 you be arguing to me with banners waiving that therefore you
7 shouldn't be on the hook for your trial for the joint liability
8 theory? Or maybe for anything, maybe even for anything?

9 MS. WITT: Well, your Honor, again, we're all sort of
10 falling into the negligence trap of thinking of this as a
11 traditional kind of joint and several liability case, which it
12 is not at all. It is absolutely possible that a jury could
13 look at the evidence relating to Roxane and say, "We don't find
14 the requisite intent," or, "We don't find the requisite
15 falsity," or, "We don't find some other element of the claim,"
16 and come out a different way against Dey or vice versa.

17 THE COURT: So you're willing to waive. I mean --

18 MS. WITT: I don't know exactly what the question --

19 THE COURT: Ah, I hear the back-pedal. Think about
20 it, think about it.

21 MS. WITT: If the jury came back and said that Dey is
22 not liable for a False Claims Act violation, I have a hard
23 time, quite frankly, understanding what the argument would be
24 that that means that Roxane is not liable under the
25 jurisprudence of the False Claims Act. I'm not going to say

1 that if there is such an argument, I'm waiving it, but I don't
2 see what it is, and it's not been articulated.

3 THE COURT: Suppose I buy their theory of joint
4 liability, but I tell the jury that both have to be guilty, and
5 they don't accept that, they don't find there's enough evidence
6 to find you guilty, so they only go on -- what would be the
7 right words, the narrower liability theory against Dey.

8 MS. WITT: Well, that would have to be in a combined
9 trial. They couldn't --

10 THE COURT: Well, that's what he's saying.

11 MS. WITT: But the argument that they've articulated
12 for joint and several liability is only half related to the
13 liability of both because if the -- you don't have to show
14 that, for instance, an absent --

15 THE COURT: I may have just lost you there.

16 MS. WITT: There are manufacturers that won't be in
17 the case.

18 THE COURT: That's irrelevant. I mean, actually, I
19 don't know if it's irrelevant, but they have the right to
20 choose tort-feasors, so unless you -- they don't have to prove
21 everybody is guilty.

22 MS. WITT: No, I understand that, but my point is, if
23 the government chose to show with an absent defendant, who I
24 agree they didn't have to sue, but if they chose to show and
25 had the evidence to say to the jury, "And Goldline's AWP was X,

1 and their acquisition cost that we've gotten from the AMPs that
2 we have was Y, so we can show you that that number was false,"
3 that's not proving Goldline's liability. That's showing a
4 simple fact. They don't have to show liability.

5 THE COURT: Right, right.

6 MS. WITT: And the idea that Mr. Henderson would have
7 to prove liability against an absent party in a trial of either
8 one of us is just wrong. And he's not articulated the basis on
9 which he'd actually have to prove liability as opposed to
10 proving the fact that the AWP in the array was not the same as
11 what they claim it should have been. That's what his theory is
12 based on.

13 THE COURT: So then you're willing to waive, I mean,
14 any argument later on on collateral estoppel against the
15 plaintiffs, if you went second, for example?

16 MS. WITT: I'm certainly not willing to waive
17 collateral estoppel issues that relate to government knowledge.
18 I'm certainly not willing to --

19 THE COURT: Fair enough, but I'm not sure I would --

20 MS. WITT: And I'm not willing to say that liability
21 has been proven against Roxane in a different case.

22 THE COURT: If I were to put a separate jury
23 interrogatory to Dey -- let's say they went first -- on
24 government knowledge, it would not estop you.

25 MS. WITT: Correct, but if the government lost and

1 that jury said, "Yes, the government knew," they would be
2 collaterally estopped against me, yes. That is one of the --

3 THE COURT: Maybe or maybe not because -- maybe on
4 ipratropium bromide but maybe not the other drugs, so --

5 MS. WITT: That's our only Medicare drug, so --

6 THE COURT: Is that right? That's useful to know.
7 Thank you.

8 MS. REID: Your Honor?

9 THE COURT: You know what, at this point I've got it,
10 and I'm not ruling until I get through my summary judgment
11 motion because that strikes me as essential to how I think
12 about this case, absolutely essential to how I think about it.
13 But since I won't know -- would I flip a coin as to who went
14 first? -- you should probably both be gearing up.

15 MS. REID: On everything, your Honor?

16 THE COURT: Because my experience is, actually, my
17 experience is that many of them come right up to trial and then
18 settle, and so I'd want the next one ready to go because I will
19 have blocked off a huge amount of time. So I'll get to
20 settlement off the record when we're done with this. I would
21 like to get to the parent/sub issue, unless you want to just
22 rest on the papers.

23 MS. REID: And that is Ms. Witt's.

24 THE COURT: That's Roxane, isn't it?

25 MS. REID: Yes. The only point I wanted to say, and

1 just real quickly, is that Mr. Henderson I think has said that
2 even in a limited trial, if it were combined, he's going to be
3 referring to other drugs as proof of intent. So the model of
4 Medicare ipratropium, if the best evidence is Furosamide and
5 Roxane's side, you're back into the whole all the drugs again
6 and --

7 THE COURT: I know, but just take a criminal trial,
8 which I'm not saying this is. It happens every day of the week
9 that there are certain things that come in against one
10 defendant and another against another. And so sometimes that's
11 unduly prejudicial and sometimes it's not, but it's something
12 you have to weigh, but it's not a slam-dunk for you.

13 MS. REID: No, no, I'm just -- I think my point is
14 simply I don't know how efficient that's going to be. If in
15 the end we have a trial where in order to prove the intent you
16 have to bring in all the surrounding drugs, even though the
17 trial is centered on one drug --

18 THE COURT: Well, I've only heard -- I don't know.

19 MS. REID: -- then we're back to the length of trial
20 you didn't want.

21 THE COURT: Well, I'll have to figure it out, but I
22 guaranty you I'm not figuring it out until I figure out the
23 motion for summary judgment.

24 MS. REID: Thank you very much, your Honor.

25 THE COURT: And I'm getting worried about when I'm

1 going to do the cross-motion, which is sort of what I thought I
2 was prepping for today. So let me just, do you want to do the
3 parent/sub for a few minutes since you're here?

4 MS. WITT: Your Honor, I frankly think -- and I
5 understand, I don't want to completely rest on the papers, but
6 it is a half-an-hour argument, if your Honor has a chance to
7 read the papers at some point in the future, and it's not a
8 time-critical issue, so my proposal would be that --

9 THE COURT: Why does it matter? What are the two main
10 arguments?

11 MS. WITT: There are two separate theories of
12 liability and two separate corporations that are also involved.
13 There is Boehringer Ingelheim Pharmaceuticals, Inc., which we
14 call BIPI in the papers, B-I-P-I, and there is Boehringer
15 Ingelheim Corporation, which we call BIC, B-I-C, in the papers.

16 THE COURT: Haven't I ruled on this in one of the many
17 cases? You don't think so?

18 MS. WITT: Certainly not while I've been representing
19 Boehringer companies, and I'm not aware of any --

20 THE COURT: In the New York county cases or in --

21 MS. WITT: In the very early AWP cases --

22 THE COURT: Early AWP?

23 MS. WITT: -- you ruled on an issue in the Nevada and
24 Montana situation where the plaintiff tried to name, I believe
25 it was Boehringer Ingelheim Pharmaceuticals as a defendant, but

1 the drugs that were named in the complaint were actually
2 related to Roxane, and you said BIPI can't be a defendant with
3 Roxane drugs, but the plaintiff never amended to name Roxane.

4 THE COURT: I see.

5 MS. WITT: So that all you decided was, you have to
6 have the drugs for that defendant.

7 THE COURT: So who should be the defendant here?

8 MS. WITT: The defendant is Roxane, Boehringer
9 Ingelheim Roxane, Inc. or Roxane Laboratories. It's the
10 entity --

11 THE COURT: Are you good for it? I mean, are you a
12 deep enough pocket?

13 MS. WITT: It depends on what the number is. It
14 depends on what the trebling is. It depends on whether
15 NovaPlus is in the case. It depends on the joint impact
16 theory. So I can't say as an absolute matter because --

17 THE COURT: Well, let's say you win on NovaPlus and
18 you win on joint impact, are you good for it?

19 MS. WITT: Yes, I think we are good for it.

20 THE COURT: How much money is that?

21 MS. WITT: Oh, I think that's, like, 30 some million
22 on the single --

23 THE COURT: And how much is the top end that you're
24 exposed to?

25 MS. WITT: \$4.5 billion.

1 THE COURT: I got the difference. So why do I even
2 have to decide this now? I mean, why don't I decide what the
3 legal liability is. And you don't need them in the case if
4 it's the lower number, right?

5 MR. FAUCI: We're not sure of that, your Honor. We
6 think the -- the Roxane-only Medicare, there's no joint impact.
7 Their Medicare damages we calculate are \$234 million. Trebled,
8 that's \$700 million.

9 THE COURT: That's with NovaPlus in it?

10 MR. FAUCI: No. We think that's our most conservative
11 Medicare theory.

12 THE COURT: All right, so with those dollars, are you
13 good for it, Roxane?

14 MS. WITT: I don't know off the top of my head what
15 the ultimate is. But let me also point out, your Honor, there
16 is a direct liability issue here too, which is also part of the
17 motion. It's not just Dey.

18 THE COURT: I understand, but, you know, can I just
19 say, it's easy for you. You're teams of lawyers. I get one
20 extra law clerk, and he leaves me. So I don't have time to go
21 through every interesting legal question unless it matters.

22 MS. WITT: And that's why my suggestion is, we wait
23 until there's resolution of these other issues, especially with
24 respect to the trial, and then we do a half-an-hour argument on
25 this, if it's necessary, because --

1 THE COURT: Does that make sense to you?

2 MR. FAUCI: That's fine for us, your Honor. We think
3 this matters from a settlement perspective. We have grave
4 concerns about whether Roxane could satisfy an \$800 million
5 verdict or a \$700 million verdict, and so from our perspective,
6 clarification on this issue --

7 THE COURT: Well, haven't you done discovery into
8 this?

9 MR. FAUCI: We have, and we have concerns --

10 THE COURT: All right, and because you have concerns
11 at your low end?

12 MR. FAUCI: Well, our low end, as I said, for the
13 Medicare damages is \$234 million.

14 THE COURT: Is that treble?

15 MR. FAUCI: No. That's single.

16 THE COURT: Is your low end. And that's --

17 MR. FAUCI: And that's not even including Medicaid.

18 THE COURT: Okay. So if you trebled it, you have some
19 concerns about whether Roxane could cover a \$600 million
20 verdict? Is that the issue? And that doesn't pick up
21 Medicaid, so it may be worth it. That's what you're saying.

22 MR. FAUCI: We think it is. We think that we feel
23 comfortable on this issue. We'd love to brief the Court on it
24 if it's something --

25 THE COURT: You've already briefed it, haven't you?

1 MR. FAUCI: To argue to the Court --

2 THE COURT: Well, let's do this. It's my fault, but I
3 hadn't understood that this was on. I should probably read it
4 first because that makes oral argument much more useful.
5 You're all up here, but you're going to be up here again
6 because I need to hear the cross-motions. When are we going to
7 do that?

8 MR. HENDERSON: From the government's perspective, at
9 your Honor's convenience.

10 THE COURT: When is Dr. Duggan coming back?

11 MR. HENDERSON: I think he's coming back Friday, this
12 Friday.

13 THE COURT: Okay.

14 MR. HENDERSON: And then Tuesday the following week.
15 But, of course, that's the Abbott case, which is mostly -- the
16 U.S. Attorney's office from the Southern District of Florida is
17 doing the work on the Daubert motions.

18 THE COURT: So you all aren't up here for that? I get
19 a little lost as to who's pressing what issues. So when can we
20 do your cross-motions?

21 MS. REID: Your Honor, when you have time, at your
22 convenience we will do them.

23 THE COURT: I'm here now. My trial this week, the
24 civil rights case settled, so I'm here in the mornings.

25 MR. HENDERSON: We've pretty much prepared our oral

1 arguments because we thought they'd be argued before, so I
2 think the lawyers --

3 THE COURT: Well, let me ask you this. Duggan -- I'm
4 free now because my trial settled and the other one continued,
5 so do you want to do it in the morning?

6 MR. HENDERSON: This Thursday?

7 THE COURT: I'm free for the week.

8 MR. HENDERSON: Friday?

9 THE COURT: Friday morning.

10 MR. HENDERSON: That's fine with me.

11 THE COURT: Do you want to call the Abbott people and
12 Duggan and see if they can make it?

13 MR. HENDERSON: Well, Professor Duggan doesn't have to
14 be here for the summary judgment.

15 THE COURT: No, right, right. I'm just saying, we
16 could do his evidentiary hearing, and instead of spanning you
17 from Friday into Tuesday, I can give you a full day on Friday.

18 MR. HENDERSON: On summary judgment?

19 THE COURT: I'm now talking the Daubert hearing on the
20 extrapolation.

21 MR. HENDERSON: Oh.

22 THE COURT: And then we can use Tuesday to do this
23 because these folks come in from out of town, don't you all?

24 MS. REID: Yes, your Honor.

25 THE COURT: So, I mean, I don't want to have them

1 sitting around on a Friday. Where are you all in from? You're
2 from Washington, New York?

3 MS. WITT: Chicago.

4 THE COURT: Chicago.

5 MS. REID: New York.

6 THE COURT: And New York. What's easier for you?
7 When do we have, Robert, Tuesday afternoon?

8 THE CLERK: Next Tuesday we have the Daubert hearing,
9 this Friday and next Tuesday.

10 THE COURT: Okay, so one thing to try to organize with
11 Robert is the following: I suddenly have time because
12 everything went away, the civil rights trial, the criminal
13 trial, gone, and so I have mornings. I am totally free. I'd
14 like to get them all argued, just get this out of here. So one
15 possibility is to get the Daubert matter completed on Friday,
16 morning and afternoon. We don't have anything else in the
17 morning, right, at this point?

18 THE CLERK: No.

19 THE COURT: Okay, perfect. And then we could do the
20 cross-motions for summary judgment on all the remaining issues
21 on Monday.

22 THE CLERK: Tuesday, the 26th.

23 MR. HENDERSON: Tuesday is my recollection also.

24 THE CLERK: The 26th.

25 THE COURT: Oh, that's when we bumped it over to?

1 MS. REID: Yes.

2 THE COURT: For that matter, though, it could be
3 Monday. Basically I'm free, which is lovely, and then I start
4 trial again that following -- I think it's February 1, and then
5 I'm on trial a lot.

6 MR. HENDERSON: I would have to check with Dr. Duggan
7 about being able to --

8 THE COURT: I understand, he's running the healthcare
9 woes of the world, which, given today's election, who knows if
10 it will still be relevant. But assuming for a minute he's
11 available --

12 MR. HENDERSON: Yes, good idea.

13 THE COURT: Is he in Washington worrying about this
14 stuff now? So if we can get him in here, that would be
15 fabulous.

16 MS. WITT: Your Honor, I could be here any day next
17 week except Monday when I have a mediation in Federal Court.

18 THE COURT: Well, maybe Tuesday. So I'm going to go
19 off the record and have you all work with Robert to come up
20 with dates just to finish up these arguments.

21 (Discussion off the record.)

22 THE COURT: So let's just try for Friday if we can
23 get -- I don't need Duggan here, okay? So --

24 MR. HENDERSON: Okay.

25 THE COURT: Okay.

1 MR. HENDERSON: So Friday anyway.

2 THE COURT: Friday, and then maybe we can use Tuesday
3 for cross-motions.

4 MR. HENDERSON: Yes.

5 THE COURT: Okay. Anything else?

6 MR. FAUCI: If I may, your Honor, I mean, if you
7 prefer to hear the BIPI motions on Tuesday, we can. Ms. Witt
8 has indicated that she thinks her presentation is going to be a
9 half an hour. Ours will be twenty minutes. We have a lot on
10 the plate on Tuesday. If you think it makes sense to hear
11 argument on this today while we're all here --

12 THE COURT: I haven't read it is the big problem. And
13 it's my fault. I just thought we were doing the cross-motions.

14 So is there anything left on Abbott's cross? Does
15 Abbott have any pending motions for summary judgment?

16 MR. HENDERSON: Yes, they too are in the mix, so
17 potentially they would be included on Tuesday. They don't have
18 a trial date, so --

19 THE COURT: Well, what about spoliation?

20 MR. HENDERSON: That needs to be -- we haven't
21 scheduled that yet.

22 THE COURT: Isn't everybody arguing spoliation?

23 MR. HENDERSON: Yes.

24 THE COURT: So that needs to be argued too.

25 MR. HENDERSON: Correct, and their big BIPI motions.

1 THE COURT: So why don't you come up with a proposed
2 schedule and file it with me as to how long it's going to take
3 and what's going to be on the agenda. I've read the spoliation
4 ones. I've read the basic cross-motions. I'm less familiar
5 with the False Claims Act claims.

6 MR. HENDERSON: Does your Honor have thoughts about
7 how much time for this whole mix, spoliation, how much time --

8 THE COURT: No.

9 MR. HENDERSON: -- you would have available?

10 THE COURT: No, but I'm thinking of fifteen minutes a
11 side for each argument, for each issue. If you persuaded me
12 otherwise, half an hour a side for each issue, and then the
13 defendants can divvy it up. But how many issues are there?
14 There's spoliation. There's -- what do you call it?

15 MS. REID: There's one more motion, which I don't know
16 if your Honor would consider as part of --

17 THE COURT: There's spoliation, there's False Claims
18 Act, right? There's the parent/sub --

19 MS. REID: And there's a motion to dismiss Ven-A-Care
20 on the grounds of the lack of jurisdiction.

21 THE COURT: Right, isn't that the False Claims -- and
22 then I guess there are statute of limitations issues.

23 MR. HENDERSON: No.

24 THE COURT: No? Well, someone called it a statute of
25 limitations problem.

1 MR. HENDERSON: I don't think so.

2 THE COURT: No? Maybe I'm thinking relation back?

3 MS. REID: Yes, you're thinking of the relation back
4 issue, which we argued in October, your Honor.

5 THE COURT: We don't need reargued, right?

6 MS. REID: No.

7 THE COURT: So maybe if you put together an agenda.
8 If it's a half an hour a side per issue, that's three hours.
9 That's doable.

10 MR. HENDERSON: Per motion?

11 THE COURT: Well, I don't know.

12 MR. HENDERSON: Per issue, some of these motions have
13 multiple issues, so --

14 THE COURT: You'd have to talk about it, but just to
15 get it done in a morning. Don't forget, you have it on the
16 piece of paper, so I don't need argument on it as well.

17 MR. HENDERSON: Shall we count on Tuesday to deal with
18 all of these?

19 THE COURT: If we can.

20 MR. HENDERSON: If we can? Okay.

21 THE COURT: Are we still free Tuesday morning?

22 THE CLERK: Yes. We have morning and afternoon, if
23 you want.

24 THE COURT: Okay, and then we'll try and finish the
25 whole rest of the Daubert on Friday.

1 MR. HENDERSON: Yes.

2 THE COURT: And if we finish the oral argument, what
3 I'd like to do is try and rule on this stuff so that I can make
4 an intelligent decision on the motion to consolidate. I've
5 just been holding off because we hadn't finished all the
6 arguments, and I need to do that.

7 Now, can we go off the record for a minute.

8 (Discussion off the record.)

9 (Adjourned, 3:41 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 57 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action Nos. 01-12257-PBS
and 06-11337-PBS, In Re: Pharmaceutical Industry Average
Wholesale Price Litigation, and thereafter by me reduced to
typewriting and is a true and accurate record of the
proceedings.

In witness whereof I have hereunto set my hand this 23rd
day of January, 2010.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL FEDERAL COURT REPORTER